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# *Kiyutin*: Protecting the Human Rights of Persons Living with HIV/AIDS Beyond Immigration

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# **KIYUTIN: PROTECTING THE HUMAN RIGHTS OF PERSONS LIVING WITH HIV/AIDS BEYOND IMMIGRATION**

SARAH LEVITAN\*

**Abstract:** People living with HIV/AIDS face many difficulties. After the European Court of Human Rights' decision in *Kiyutin v. Russia*, these difficulties may be fewer. Viktor Kiyutin brought his case before the court after Russia denied him a residence permit because he was HIV-positive. Although very few countries still have travel restrictions or immigration bans discriminating against people with HIV/AIDS, the court's holding sets an important precedent. In making its decision on the basis of the anti-discrimination provision of Article 14 of the European Convention on Human Rights, the court has now brought health status within the protection of the Convention, thus prohibiting differential treatment on account of an individual's health.

## INTRODUCTION

In March 2011, the European Court of Human Rights (ECtHR) quietly issued an opinion that will have a critical, long-lasting impact.<sup>1</sup> In *Kiyutin v. Russia*, the court held that Russia could not deny a residence permit to an individual solely because of his HIV-positive status.<sup>2</sup> This opinion solidified what the United Nations (UN) and AIDS activists have long sought to establish—that those with HIV/AIDS are members of a protected class, and may not be discriminated against as a result of their health status.<sup>3</sup> This opinion has wide-reaching effects beyond pro-

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<sup>1</sup> See *Kiyutin v. Russia*, INTERIGHTS, <http://www.interights.org/kiyutin/index.html> (last visited Oct. 9, 2012) [hereinafter Interights Litigation Summary].

<sup>2</sup> App. No. 2700/10, 53 Eur. H.R. Rep. 897, 918–19 (2011).

<sup>3</sup> See Joint U.N. Programme on HIV/AIDS, Dec. 15–18, 2008, Report of the International Task Team on HIV-related Travel Restrictions: Findings and Recommendations, 22–23, U.N. Doc. UNAIDS/09.19E/JC1715E (Dec. 2008) [hereinafter International Task Team Report]; JOINT U.N. PROGRAMME ON HIV/AIDS & INT'L ORG. FOR MIGRATION, UNAIDS/IOM STATEMENT ON HIV/AIDS-RELATED TRAVEL RESTRICTIONS 10 (2004) [hereinafter UN-AIDS/IOM STATEMENT], available at [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/health/UNAIDS\\_IOM\\_statement\\_travel\\_restrictions.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/health/UNAIDS_IOM_statement_travel_restrictions.pdf);

hibiting discrimination against those with HIV/AIDS in immigration—it opens the door for protection in a variety of other realms as well.<sup>4</sup>

Part I of this Comment explains the pertinent facts of the *Kiyutin* case. Part II more closely examines the court's analysis and application of relevant standards in the context of the worldwide campaign to end the restrictions previously placed on individuals infected with HIV/AIDS. Part III then explores the significant impact this decision may have on other areas of law and describes the new protections now extended to individuals around the world suffering with HIV/AIDS. Finally, this Comment concludes that the court's choice to protect HIV-positive individuals from discrimination represents a significant change in tide for this disadvantaged group and will have implications far beyond the realm of immigration.

### I. BACKGROUND

Viktor Kiyutin, a citizen of Uzbekistan, relocated to Russia after his brother bought land in 2002.<sup>5</sup> Soon after, Kiyutin married a Russian national and applied for a residence permit in 2003.<sup>6</sup> The Foreign Nationals Act required that individuals applying for permits pass an HIV test<sup>7</sup>—a test which Kiyutin failed.<sup>8</sup> Despite the permit denial, Kiyutin remained in Russia with his wife and new daughter, who was born in 2004.<sup>9</sup>

In 2009, Kiyutin gained the attention of the Federal Migration Service after reapplying for a residence permit.<sup>10</sup> The agency determined that Kiyutin had remained in the country illegally.<sup>11</sup> He subsequently was given the choice to leave Russia or be deported.<sup>12</sup> Kiyutin challenged this decision in both a district court and a regional court, but was not granted a residence permit.<sup>13</sup> In a final attempt to keep his family together, Kiyutin brought his case to the ECtHR, claiming viola-

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see also Pamela Kohler, *Using Disability Law to Protect Persons Living with HIV/AIDS: The Indian and American Approach*, 19 J. TRANSNAT'L L. & POL'Y 401, 401 (2010).

<sup>4</sup> Interights Litigation Summary, *supra* note 1.

<sup>5</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 899–900.

<sup>6</sup> *Id.* at 900.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 900.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

tions of Articles 8, 13, 14, and 15 of the European Convention on Human Rights (ECHR).<sup>14</sup>

In its submission to the ECtHR, the Russian government focused its argument on the necessity of HIV-related restrictions to prevent the spread of HIV/AIDS, an epidemic that plagues the country.<sup>15</sup> A nation of roughly 140 million, Russia has the second-highest HIV prevalence in Eastern Europe and Eurasia at 1.1%.<sup>16</sup> On average, one out of every fifty males is infected with HIV, and in some Russian cities, as many as one in ten males may be infected.<sup>17</sup>

The Russian government previously explained that HIV-based restrictions protected Russian constitutional values, primarily those of state protection of public health.<sup>18</sup> That rationale only conveyed a blanket discriminatory restriction, however, because the government did not explain why Kiyutin's personal circumstances would pose a more significant threat to the general public than anyone else with HIV/AIDS.<sup>19</sup> The government cited Kiyutin's previous criminal record, but failed to explain its relevance to the spreading of the disease, which seemed to indicate that anyone with the same health status would be treated differently from the general population.<sup>20</sup>

The government justified the denial of Kiyutin's application by noting that it was necessary to protect the Russian public, while merely posing an inconvenience to Kiyutin.<sup>21</sup> The government suggested that Kiyutin, even as a foreign national, could easily remain in Russia for a period of ninety days, exit the country and then return again, starting another ninety-day period of stay.<sup>22</sup> Alternatively, the Russian government suggested Kiyutin and his family could just relocate to Uzbekistan to keep the family together.<sup>23</sup>

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<sup>14</sup> *Id.* at 908.

<sup>15</sup> *Id.* at 909.

<sup>16</sup> U.S. AGENCY FOR INT'L DEV., RUSSIA HIV/AIDS HEALTH PROFILE 1 (2010), *available at* [http://transition.usaid.gov/our\\_work/global\\_health/aids/Countries/cande/russia\\_profile.pdf](http://transition.usaid.gov/our_work/global_health/aids/Countries/cande/russia_profile.pdf).

<sup>17</sup> Guy Faulconbridge, *Russia Warns of AIDS Epidemic, 1.3 Mln with HIV*, REUTERS (May 15, 2007, 12:22 PM), <http://www.reuters.com/article/2007/05/15/us-russia-aids-idUSL1546187520070515>.

<sup>18</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 902.

<sup>19</sup> *See id.* at 910.

<sup>20</sup> *See id.* at 909.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

In contrast, Kiyutin claimed that his removal violated Article 8 by disrupting his family life because all of his family remained in Russia.<sup>24</sup> In addition, although the ECtHR has recognized that states have discretion concerning who is permitted to enter their territory,<sup>25</sup> Kiyutin argued his denial was solely discriminatory and served no other goals of the state.<sup>26</sup> He argued this was also a violation of Article 14 of the ECHR, which provides: “[t]he enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>27</sup>

Kiyutin’s arguments were bolstered by a third-party intervenor, The International Centre for the Legal Protection of Human Rights (Interights).<sup>28</sup> Interights emphasized that whenever a particular status creates “societal and attitudinal barriers,” it should be considered a disability for the purposes of protection against discrimination.<sup>29</sup> Interights further highlighted the ECtHR’s historical commitment to protecting disabled persons,<sup>30</sup> while stressing that HIV-status-based travel restrictions have no public health or public cost justifications.<sup>31</sup>

The court ultimately determined that Russia violated Kiyutin’s Article 14 rights in conjunction with Article 8, holding that he experienced differential treatment solely on account of his health status, and that this difference in treatment did not respect his private and family life.<sup>32</sup> Kiyutin was awarded damages for his distress and frustration.<sup>33</sup>

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<sup>24</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 908–10.

<sup>25</sup> *Id.* at 912; Written Submission of Interights at 5, *Kiyutin v. Russia*, 53 Eur. H.R. Rep. 897 (App. No. 2700/10) (2011), available at <http://www.interights.org/document/8/index.html> (follow “Download” hyperlink).

<sup>26</sup> See *Kiyutin*, 53 Eur. H.R. Rep. at 910.

<sup>27</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>28</sup> See Interights Litigation Summary, *supra* note 1.

<sup>29</sup> Written Submission of Interights, *supra* note 25, at 3.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 6–9.

<sup>32</sup> See *Kiyutin*, 53 Eur. H.R. Rep. at 918–19.

<sup>33</sup> *Id.* at 920.

## II. DISCUSSION

### A. *The Campaign to End Travel Restrictions on Individuals with HIV/AIDS*

Since the beginning of the HIV/AIDS epidemic, both government and non-government organizations have fought public fear and the stigma that attaches to infected persons.<sup>34</sup> Because HIV may be contracted via some behaviors that historically are looked upon with great disdain—unprotected sex, homosexual relations, or intravenous drug use—HIV-positive individuals face societal disadvantages.<sup>35</sup> Those with HIV/AIDS are left out of political discourse as the public at large generally considers the disease self-inflicted and the result of an individual's own poor choices.<sup>36</sup>

Travel restrictions—prohibiting entrance and residence in a country—were introduced in the 1980s and quickly became widespread.<sup>37</sup> Such restraints were the product of limited knowledge and unfounded beliefs that those infected would act carelessly and spread the disease.<sup>38</sup> As societies have recognized that controllable behavior prevents the contraction of HIV/AIDS,<sup>39</sup> restrictions on travel and immigration have gradually disappeared.<sup>40</sup> Currently, 128 countries have no restrictions at all, but forty-nine countries still limit entrance by HIV-positive individuals.<sup>41</sup> These limitations are in place in developing countries and world

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<sup>34</sup> See International Task Team Report, *supra* note 3, at 3; U.N. HIGH COMM'R FOR HUMAN RIGHTS & JOINT U.N. PROGRAMME ON HIV/AIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS (2006 CONSOLIDATED VERSION), at 106–11, U.N. Doc. HR/PUB/06/9, U.N. Sales No. E.06.XIV.4 (2006) [hereinafter INTERNATIONAL GUIDELINES].

<sup>35</sup> See UNAIDS/IOM STATEMENT, *supra* note 3, at 8; INTERNATIONAL GUIDELINES, *supra* note 34, at 5; Danna Delgado Stempniak, Comment, *Seeking Asylum Status for HIV-Positive Aliens Based on Membership in a Persecuted Social Group: An Alternative to Overturning the United States' Exclusion of HIV-Positive Aliens from Immigration*, 24 S. ILL. U. L.J. 121, 132–33 (1999) (explaining intersectionality theory, which posits that people who belong to multiple marginalized groups face compounded discrimination); April Thompson, Note, *The Immigration HIV Exclusion: An Ineffective Means for Promoting Public Health in a Global Age*, 5 Hous. J. HEALTH L. & POL'Y 145, 149, 168 n.203 (2005).

<sup>36</sup> See Stempniak, *supra* note 35, at 132–33; Thompson, *supra* note 35, at 168.

<sup>37</sup> See International Task Team Report, *supra* note 3, at 3; Thompson, *supra* note 35, at 168.

<sup>38</sup> See UNAIDS/IOM STATEMENT, *supra* note 3, at 8.

<sup>39</sup> See *id.*

<sup>40</sup> Sherryl S. Zoumes, Note, *Positive Movement: Revisiting the HIV Exclusion to Legal Immigration*, 22 GEO. IMMIGR. L.J. 529, 529 (2008).

<sup>41</sup> JOINT U.N. PROGRAMME ON HIV/AIDS, HIV-RELATED RESTRICTIONS ON ENTRY, STAY AND RESIDENCE 1–2 (2011) [hereinafter HIV-RELATED RESTRICTIONS], available at [http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20110620\\_CountryList\\_TravelRestrictions\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20110620_CountryList_TravelRestrictions_en.pdf).

powers alike; until January 2010, the United States had a complete ban on entry for HIV-positive individuals.<sup>42</sup> Of the countries that still have restrictions, Russia is one of only twenty-two that deport individuals once their HIV status is discovered.<sup>43</sup> Of these deporting states, only three are Council of Europe Member States.<sup>44</sup>

Although few countries still impose travel restrictions on those with HIV/AIDS, progress has been hard-won.<sup>45</sup> Many years of advocacy and policy-making aimed at ending the differential treatment of those with HIV/AIDS enabled this progress.<sup>46</sup> As far back as 1989, the Parliamentary Assembly of the Council of Europe recognized that it was “essential to ensure that human rights and fundamental freedoms [were] not jeopardised on account of the fear aroused by AIDS.”<sup>47</sup> The UN continues to focus attention on the matter, and in 1996 requested that the Joint United Nations Programme on HIV/AIDS (UNAIDS), in conjunction with other international organizations, coordinate comprehensive and global action.<sup>48</sup> Along with the Office of the United Nations High Commissioner for Human Rights, UNAIDS promulgated their International Guidelines on HIV/AIDS and Human Rights.<sup>49</sup> The guidelines aim to create standards for law, administrative practice, and policy decisions and have been continuously reviewed since their inception.<sup>50</sup> Additionally, UNAIDS created a task force with the sole focus of eliminating travel restrictions on HIV-positive individuals.<sup>51</sup> The task force and other organizations have published several works that discredit both the public health and public cost rationales that states identify in order to justify travel restrictions.<sup>52</sup>

The task force reports emphasize that public health is not protected through prohibiting entrance into a country already inhabited by individuals infected with HIV/AIDS, as those seeking to immigrate are no more likely to behave carelessly regarding their disease than are

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<sup>42</sup> See *id.*; *US Lifts HIV/AIDS Immigration Ban*, BBC News, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/8438865.stm> (last updated Jan. 4, 2010).

<sup>43</sup> HIV-RELATED RESTRICTIONS, *supra* note 41, at 2.

<sup>44</sup> *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 897, 908 (2011).

<sup>45</sup> See INTERNATIONAL GUIDELINES, *supra* note 34, at 107–11 (outlining continued efforts to remove HIV-related travel restrictions).

<sup>46</sup> See *id.*

<sup>47</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 904.

<sup>48</sup> See INTERNATIONAL GUIDELINES, *supra* note 34, at 10.

<sup>49</sup> *Id.*

<sup>50</sup> See *id.* at 4–6; Helen Watchirs, *A Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws*, 22 AUSTL. Y.B. INT'L L. 77, 78 (2002).

<sup>51</sup> International Task Team Report, *supra* note 3, at 7.

<sup>52</sup> See, e.g., *id.* at 4.

citizens.<sup>53</sup> This is particularly true in Russia, where high HIV contraction rates result from extensive drug use within the country.<sup>54</sup> Rather, the reports suggest that energy and resources are much better focused on education: teaching those who have the disease how to properly control it, and instructing those who are healthy how to avoid the risky behaviors that could lead to contraction of the disease.<sup>55</sup>

Additionally, these reports undercut the public cost rationale, arguing that travel restrictions are more costly than treating individuals within the country.<sup>56</sup> Due to advances in medicine, many individuals with HIV/AIDS live long and productive lives, contributing to the economy in excess of the costs of their care.<sup>57</sup> Enforcing the restrictions is also costly.<sup>58</sup> Between 1990 and 1995, Russia screened 253,399 people, three of which were HIV-positive.<sup>59</sup> Because each test costs the equivalent of four dollars, detecting one HIV-positive individual—which occurs approximately once in every 84,466 tests—costs the Russian government \$333,000.<sup>60</sup> Moreover, the healthcare costs of those with HIV/AIDS are no more excessive than those of someone with any other long term illness, such as cancer or heart disease.<sup>61</sup> Yet, such illnesses do not result in like discrimination against those suffering.<sup>62</sup>

The relative costs of restriction versus care, and HIV/AIDS care versus care for other diseases casts doubt on the need for blanket prohibitions on entry and travel.<sup>63</sup> Further, reports highlight that restrictions can be harmful, leading to a lack of knowledge and false sense of security within borders.<sup>64</sup>

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<sup>53</sup> See UNAIDS/IOM STATEMENT, *supra* note 3, at 8; ALANA KLEIN, CANADIAN HIV/AIDS LEGAL NETWORK, HIV/AIDS AND IMMIGRATION FINAL REPORT 50–51 (2002), available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=853>.

<sup>54</sup> U.N. DEV. PROGRAM, GLOBAL COMM'N ON HIV AND THE LAW, HIV AND THE LAW IN EASTERN EUROPE AND CENTRAL ASIA 13 (2011), available at [http://issuu.com/undp\\_in\\_europe\\_cis/docs/hiv\\_and\\_the\\_law](http://issuu.com/undp_in_europe_cis/docs/hiv_and_the_law).

<sup>55</sup> KLEIN, *supra* note 53, at 52; Stempniak, *supra* note 35, at 127–28.

<sup>56</sup> See International Task Team Report, *supra* note 3, at 4; UNAIDS/IOM STATEMENT, *supra* note 3, at 9; Zounes, *supra* note 40, at 543.

<sup>57</sup> See International Task Team Report, *supra* note 3, at 4; UNAIDS/IOM STATEMENT, *supra* note 3, at 9; Zounes, *supra* note 40, at 543.

<sup>58</sup> See Peter A. Barta, Note, *Lambskin Borders: An Argument for the Abolition of the United States' Exclusion of HIV-Positive Immigrants*, 12 GEO. IMMIGR. L.J. 323, 357 (1998).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Written Submission of Interights, *supra* note 25, at 9; KLEIN, *supra* note 53, at 58; Zounes, *supra* note 40, at 543.

<sup>62</sup> See Written Submission of Interights, *supra* note 25, at 9.

<sup>63</sup> See UNAIDS/IOM STATEMENT, *supra* note 3, at 1.

<sup>64</sup> International Task Team Report, *supra* note 3, at 20.



Even as travel restrictions disappear, those suffering from HIV/AIDS still face a multitude of political problems.<sup>65</sup> Three out of ten countries lack laws to protect the human rights of HIV-positive individuals and prohibit discrimination on the basis of health.<sup>66</sup> Of the countries that do have laws intended to protect HIV-positive individuals from discrimination, fewer than 60 percent of those countries provide a means for reporting violations, making enforcement difficult in practice.<sup>67</sup>

### B. *The European Court's Rationale in Kiyutin*

Kiyutin presented his case to the ECtHR while national travel restrictions were becoming less prevalent.<sup>68</sup> Although Kiyutin claimed violations of his rights under four different ECHR Articles, the court focused on differential treatment as the basis of its decision, using Article 14 in conjunction with Article 8,<sup>69</sup> with Article 8 substantive rights serving as the foundation for the Article 14 violation.<sup>70</sup> The ECtHR emphasized that Article 14 is to be read broadly because the list of prohibited grounds for differential treatment is illustrative, not exhaustive.<sup>71</sup> The court further explained that historically, a health status or disability was protected under the "other status" language in the Article, citing various reports on human rights matters and the treatment of AIDS as a disability.<sup>72</sup> The court stated:

Ignorance about how the disease spreads has bred prejudices which, in turn, has stigmatised or marginalised those who carry the virus . . . . The Court therefore considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures

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<sup>65</sup> See U.N. Secretary-General, *Uniting for Universal Access: Towards Zero New HIV Infections, Zero Discrimination and Zero AIDS-Related Deaths*, ¶¶ 37–39, U.N. Doc. A/65/797 (Mar. 28, 2011).

<sup>66</sup> *Id.* ¶ 6.

<sup>67</sup> *Id.*

<sup>68</sup> See *Kiyutin*, 53 Eur. H.R. Rep. at 897; INTERNATIONAL GUIDELINES, *supra* note 34, at 106–11.

<sup>69</sup> *Kiyutin*, Eur. H.R. Rep. at 908–09, 919.

<sup>70</sup> EUR. CT. HUM. RTS., HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 60 (2010) [hereinafter HANDBOOK], available at [http://www.echr.coe.int/NR/rdonlyres/DACA17B3-921E-4C7C-A2EE-3CDB68B0133E/0/ENG\\_FRA\\_CASE\\_LAW\\_HANDBOOK\\_01.pdf](http://www.echr.coe.int/NR/rdonlyres/DACA17B3-921E-4C7C-A2EE-3CDB68B0133E/0/ENG_FRA_CASE_LAW_HANDBOOK_01.pdf).

<sup>71</sup> *Kiyutin*, Eur. H.R. Rep. at 913.

<sup>72</sup> See *id.* at 903–04, 913–14.

that single out this group for differential treatment on the basis of their HIV status.<sup>73</sup>

Thus, the court explicitly brought HIV/AIDS under the purview of Article 14 and established that a person can be excluded because of his or her HIV-positive status *only after* a thorough and individualized investigation determines that he or she poses a unique and substantial risk to the general population.<sup>74</sup>

Additionally, the ECtHR expressed concern about Russian Constitutional Court case law.<sup>75</sup> Although Russian cases permitted government officials to take individual circumstances into account when evaluating an HIV-positive individual's immigration status, they did not *require* that officials conduct such an investigation or state that individualized findings would supersede the mandatory deportation required under the Foreign Nationals Act.<sup>76</sup> Regardless, the ECtHR determined that the required individualized analysis had not occurred in Kiyutin's case.<sup>77</sup> Although the Russian government cited Kiyutin's criminal history as a reason for their refusal, the court rejected the validity of his denial on that ground because the government did not support this claim with specific evidence or documents.<sup>78</sup> Therefore, the only basis remaining for Kiyutin's rejection was his HIV-positive status.<sup>79</sup>

Thus, the ECtHR opinion concluded that Russia's practice of denying residence permits to those with HIV/AIDS violated Article 14.<sup>80</sup> According to the court, HIV/AIDS status is not an acceptable ground for differential treatment, and therefore, travel restrictions based solely on such status are discriminatory and prohibited.<sup>81</sup> Additionally, a state must demonstrate particularly compelling reasons for any action against this protected group.<sup>82</sup> While Russia's protection of public health is a legitimate aim, it was not sufficiently connected to the exclusion of Kiyutin on account of his HIV-positive status.<sup>83</sup>

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<sup>73</sup> *Id.* at 915.

<sup>74</sup> *See id.* at 915–16, 918–19.

<sup>75</sup> *See id.* at 918–19.

<sup>76</sup> *See id.*

<sup>77</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 914.

<sup>78</sup> *Id.* at 914, 918–19.

<sup>79</sup> *Id.* at 914.

<sup>80</sup> *See id.* at 918–19.

<sup>81</sup> *See id.*

<sup>82</sup> *Id.* at 915–16.

<sup>83</sup> *Kiyutin*, 53 Eur. H.R. Rep. at 918.

## III. ANALYSIS

It is significant that the ECtHR based its decision on a violation of the rarely used Article 14, especially given the various arguments Kiyutin presented to the court.<sup>84</sup> The court used the uncontroversial setting of outdated travel restrictions as an opportunity to create an important precedent.<sup>85</sup> Additionally, the decision in *Kiyutin v. Russia* will have a long-lasting impact for persons with HIV/AIDS in immigration and, more importantly, in other public spheres.<sup>86</sup>

The ECtHR rarely conducts an Article 14 analysis, because Article 14's operation is limited to discrimination that occurs in the context of a right outlined in other Articles of the ECHR.<sup>87</sup> Typically, the court concludes its analysis after determining that a violation of the underlying substantive right has occurred, and, as a result, violations of Article 14 are rare.<sup>88</sup> As of 2011, of the 14,854 judgments in which the ECtHR found a violation of a right, only 179 were on Article 14 grounds.<sup>89</sup> Of the 1,212 adverse opinions against Russia, only five have been grounded in Article 14.<sup>90</sup>

The information presented in *Kiyutin* could reasonably have resulted solely in an Article 8 violation.<sup>91</sup> Article 8 prohibits interference in private and family life unless it is necessary to protect "public safety or the economic well-being of the country . . . [or] for the protection of health or morals."<sup>92</sup> Because the *Kiyutin* decision disposes of both pub-

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<sup>84</sup> See *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 897, 908–09 (2011); HANDBOOK, *supra* note 70, at 60.

<sup>85</sup> See Jarlath Clifford, *The UN Disability Convention and Its Impact on European Equality Law*, 6 EQUAL RTS. REV. 11, 21–22 (2011); Zounes, *supra* note 40, at 529 (illustrating the decrease in the number of countries with HIV-based travel restrictions).

<sup>86</sup> See 53 Eur. H.R. Rep. at 919; Clifford, *supra* note 85, at 21–22.

<sup>87</sup> HANDBOOK, *supra* note 70, at 60.

<sup>88</sup> *Id.* at 60, 119.

<sup>89</sup> EUR. CT. HUM. RTS., VIOLATION BY ARTICLE AND BY STATE: 1959–2011 2 (2010), available at [http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau\\_de\\_violations\\_19592010\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf).

<sup>90</sup> *Id.*

<sup>91</sup> See Interights Litigation Summary, *supra* note 1; see also Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. INT'L & COMP. L. REV. 79, 103 (2005) ("[T]he [ECtHR] has long recognized that the right to family life enshrined in Article 8 of the European Convention may impose positive duties on the state in the field of immigration.").

<sup>92</sup> ECHR, *supra* note 27, art. 8. The full text of Article 8 provides:

. . . Everyone has the right to respect for his private and family life, his home and his correspondence.

. . . There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

lic health and public cost rationales for travel restrictions, the ECtHR could simply have concluded that Russia unnecessarily interfered with Kiyutin's private and family life and thus violated Article 8.<sup>93</sup> It is clear, then, that the court's decision to include the Article 14 analysis in *Kiyutin* was purposeful.<sup>94</sup>

In finding an Article 14 violation in its analysis of Kiyutin's claim, the court has solidified health status—in particular HIV-positive status—as a classification protected from discrimination.<sup>95</sup> Moving forward, HIV-positive individuals will be protected against differential treatment regarding any of the rights explicitly protected under the ECHR, not simply against discrimination on immigration or citizenship grounds.<sup>96</sup> Generally, the ECHR is more extensive than municipal human rights statutes, and thus offers protection beyond that available through national constitutional courts.<sup>97</sup> This additional protection is especially important in countries that continue to undervalue the human rights of those with HIV/AIDS.<sup>98</sup>

Additionally, the ECtHR has recently expanded the scope of protection beyond the explicit rights of the ECHR.<sup>99</sup> The court now uses Article 14 to protect against discrimination under a widely-defined “ambit” of a substantive ECHR right.<sup>100</sup> This permits the court to extend protection into areas in which HIV-positive individuals may experience additional discrimination, such as in employment or the provision of governmental services.<sup>101</sup> This is significant because as recently as 2010, a UN survey revealed that more than one-third of individuals

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democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Id.*

<sup>93</sup> See Interights Litigation Summary, *supra* note 1.

<sup>94</sup> See HANDBOOK, *supra* note 70, at 60, 119.

<sup>95</sup> See *Kiyutin*, 53 Eur. H.R. Rep. at 915.

<sup>96</sup> HANDBOOK, *supra* note 70, at 85.

<sup>97</sup> *Id.* at 61.

<sup>98</sup> See U.N. Secretary-General, *supra* note 65, at 4; THE GLOBAL FUND, HIV AND HUMAN RIGHTS: INFORMATION NOTE 1 (2011), available at [www.theglobalfund.org/documents/rounds/11/R11\\_HIVHumanRights\\_Infonote\\_en/](http://www.theglobalfund.org/documents/rounds/11/R11_HIVHumanRights_Infonote_en/).

<sup>99</sup> Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211, 215–16 (2009).

<sup>100</sup> HANDBOOK, *supra* note 70, at 61.

<sup>101</sup> See O'Connell, *supra* note 99, at 215–16.

with AIDS still experience loss of work, denial of health care, and social exclusion.<sup>102</sup>

As a result of HIV-positive individuals' protected status, any restriction of their rights is subject to a higher degree of scrutiny from the court.<sup>103</sup> Yet the ECtHR's decision has additional social and political implications beyond the court's jurisdiction.<sup>104</sup> The campaign against HIV/AIDS discrimination has lacked any binding international legal authority in which to ground its efforts.<sup>105</sup> The UN, despite its intense efforts, was only able to offer guidelines for safeguards against HIV/AIDS-based human rights violations and thus could only influence those countries already intending to protect individuals with HIV/AIDS.<sup>106</sup>

The *Kiyutin* decision supplies some binding legal authority to the HIV/AIDS anti-discrimination movement, and explicitly includes HIV/AIDS as a health status within the "other status" category.<sup>107</sup> "Other status" previously did not include HIV/AIDS unless a state chose to interpret the provision in such a manner.<sup>108</sup> Therefore, international protection previously was neither predictable nor guaranteed.<sup>109</sup> With this opinion, parties to the ECHR are obligated to refrain from differential treatment, and other international bodies will be persuaded to ensure those with HIV/AIDS are not treated differently on account of their disease.<sup>110</sup>

#### CONCLUSION

*Kiyutin v. Russia* is significant not because of its particular outcome, but for establishing much-needed precedent. Ensuring protection against discrimination to persons in poor health affects a substantial population around the world. This opinion represents a significant step forward for the particularly ostracized population infected with HIV/AIDS. Their illness causes pain and social isolation, as some ways

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<sup>102</sup> U.N. Secretary-General, *supra* note 65, at 10.

<sup>103</sup> See *Kiyutin*, 53 Eur. H.R. Rep. at 915.

<sup>104</sup> Interights Litigation Summary, *supra* note 1; see Clifford, *supra* note 85, at 22.

<sup>105</sup> Interights Litigation Summary, *supra* note 1.

<sup>106</sup> See INTERNATIONAL GUIDELINES, *supra* note 34, at 7; Watchirs, *supra* note 50, at 98 (explaining that the *Guidelines* were intended to help implement international standards in a state's actual practice).

<sup>107</sup> See 53 Eur. H.R. Rep. at 913–14; Richard Elliott et al., *HIV, Disability and Discrimination: Making the Links in International and Domestic Human Rights Law*, 12 J. INT'L AIDS Soc'y 1, 7 (2009); Interights Litigation Summary, *supra* note 1.

<sup>108</sup> See Elliott et al., *supra* note 107, at 7.

<sup>109</sup> See *id.*

<sup>110</sup> See *Kiyutin*, 53 Eur. H.R. Rep. at 918–19.

of contracting the disease lead to public discrimination and limit the compassion generally extended to people with other serious illnesses. With the newfound protection under the ECHR granted by the *Kiyutin* court, HIV-positive individuals are stringently protected against differential treatment that results from their health status. A broad reading of the ECHR extends this much-needed protection to virtually all realms of life and grants significant political influence across the world. As a result of the *Kiyutin* opinion, the HIV-positive population, previously a severely disadvantaged group, gains some legal protection and support in the international community.

